



GEORGETOWN LAW  
INSTITUTE FOR PUBLIC REPRESENTATION

Hope M. Babcock  
Angela J. Campbell  
Brian Wolfman  
Directors  
Thomas Gremillion  
Anne King  
Laura M. Moy\*  
Margot J. Pollans  
Blake E. Reid  
Staff Attorneys

600 New Jersey Avenue, NW, Suite 312  
Washington, DC 20001-2075  
Telephone: 202-662-9535  
TDD: 202-662-9538  
Fax: 202-662-9634

October 9, 2012

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12 St. SW  
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation, MM Docket No. 99-25 – Creation of a  
Low Power Radio Service

Dear Ms. Dortch:

On Thursday, October 4, Brandy Doyle of Prometheus Radio Project and Angela Campbell, Laura Moy, and law student Amanda Burkett of the Institute for Public Representation, Counsel for Prometheus Radio Project (collectively “Prometheus representatives”), met with Bill Scher and Royce Sherlock of the Commission’s Office of General Counsel.

**A Local Origination Requirement for LPFM Licensees Will Better Ensure that  
LPFM Stations Serve Local Community Needs**

Prometheus representatives explained that LPFM was established to serve uniquely local needs. There has only been one round of LPFM applications in the past, and the next round will likely be the last opportunity to establish LPFM stations due to spectrum scarcity. The rules governing the first round of

\* Admitted to the Maryland bar only; DC bar membership pending. Practice supervised by members of the DC bar.

applications included one preference point for applicants who pledged to provide eight hours of locally originated broadcasting per day, but in March the Commission sought comment on whether to impose a local origination program requirement instead.<sup>1</sup> Prometheus filed comments strongly encouraging the Commission to replace the applicant preference point with a requirement that any LPFM licensee produce a minimum of 20 hours per week of locally originated programming.<sup>2</sup>

Prometheus representatives explained at this meeting that we continue to believe a local origination requirement is necessary to ensure that LPFM licenses are awarded to applicants that are well-situated to serve local needs, rather than to applicants that will not be able to produce local programming and will instead have to air nationally syndicated non-local programming. As the Commission's recent literature review on the critical information needs of the American public found, although "low power FM stations frequently are started with the explicit intention of addressing the critical information needs of specific community groups that other media outlets systematically neglect," recent research suggests that "the original vision" of LPFM "is to some extent being subverted by national organizations that are creating de facto programming networks that are undermining the extent to which LPFM stations are providing locally-produced news and information."<sup>3</sup> The literature review cited a 2009 study conducted by scholars at Penn State University called *A Slice of the Pie: Examining the State of the Low Power FM Radio Service in 2009*, which was also cited in comments filed by Prometheus Radio Project in May.<sup>4</sup> Out of approximately 1,000 LPFM licensees examined between late 2008 and 2009, the study reported that

---

<sup>1</sup> LPFM Fifth Report & Order, Fourth FNPRM and Fourth Order on Recon, MB Dkt No. 99-25 (filed Mar. 19 2012), at ¶63 (asking, "should we impose a specific requirement that all new LPFM licensees provide locally-originated programming?").

<sup>2</sup> Comments of Prometheus Radio Project, MM Dkt. No. 99-25 (filed May 7, 2012) at 35-47.

<sup>3</sup> Lewis Friedland, Philip Napoli, Katherine Ognyanova, Carola Weil, & Ernest J. Wilson III, *Review of the Literature Regarding Critical Information Needs of the American Public* 50-51 (2012), available at [http://transition.fcc.gov/bureaus/ocbo/Final\\_Literature\\_Review.pdf](http://transition.fcc.gov/bureaus/ocbo/Final_Literature_Review.pdf), (citing Colleen Connolly-Ahern, Amit Schejter, Jonathan Obar, & Nadia Martinez-Carrillo, *A Slice of the Pie: Examining the State of Low Power FM Radio Service in 2009* (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2000228](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000228)).

<sup>4</sup> Comments of Prometheus Radio Project, MM Dkt. No. 99-25 (filed May 7, 2012) at 41-42 (citing Connolly-Ahern, et al., *supra* note 3).

234, nearly a quarter, were either by name or affiliation . . . identified with a national religious organization. In addition, some of the religious organizations self-describe themselves on their web pages as “networks” and list the LPFM stations as “members.”

It is not an efficient use of the spectrum to use a radio service that is purposely designed to reach small audiences and provide an outlet for underserved local communities to distribute nationally syndicated programming that could be distributed by satellite radio or the internet. While imposing a local origination requirement of 20 hours per week would not prohibit LPFM stations from forming affiliations with national networks or selecting some non-locally originated programming to serve local needs, it would limit the number of applications by ensuring that only those willing to originate programming could apply. Requiring 20 hours per week is not unduly burdensome; it is less than the eight hours per day currently required to obtain a local origination preference point. At the same time, such a requirement would better ensure that each and every LPFM licensee will fulfill the original intent of meeting local community needs.

### **The Local Origination Requirement Does Not Violate the First Amendment**

Prometheus noted that no commenter in this proceeding has argued that a local origination requirement would violate the First Amendment, thus making it unlikely that anyone could or would bring a constitutional challenge. But in any event, requiring some amount of local origination would not violate the First Amendment.

As the Supreme Court made clear in *Red Lion*, First Amendment standards as applied to broadcasting must account for spectrum scarcity. Because not everyone who wants a broadcast license can have one, the government may constitutionally impose reasonable requirements to serve the public interest on those that are granted licenses. Because the LPFM service was created to ensure an outlet for local voices and service to small, underserved communities, requiring some amount of local origination is a reasonable means to ensure that the spectrum allocated to low power service is used as intended.

*Red Lion* remains good law and can only be overturned by the Supreme Court. Yet, the Supreme Court has rejected the opportunity to revisit *Red Lion* on four separate occasions over the last several years – in both *Fox I* and *Fox II* and in denying *certiorari* in appeals of the 2002 Biennial and 2006 Quadrennial Broadcast Ownership reviews. Moreover, spectrum scarcity remains a real and growing problem. The fact that the Commission is expecting many more applicants for LPFM stations than can be granted is one indication. Another is the FCC's recent efforts to encourage broadcast stations to share or voluntarily give up spectrum to allow the spectrum to be used for wireless telecommunications services.

Requiring LPFM licensees to originate 20 hours of programming per week is not a content-based regulation. Each licensee will remain free to determine what to broadcast. The rule would not require licensees to broadcast any point of view or even any particular type of programming. Locally originated programming need not address local issues only. At bottom, such a requirement is no different than requiring (as the FCC rules do) that some licensees have a main studio located in or near their community of license. If the requirement were to have any effect on program discretion, it would be far less than other existing requirements such as requiring stations operating on reserved spectrum to provide noncommercial educational programming, requiring stations to provide political candidates with equal access, requiring stations to offer reasonable access for federal candidates, and requiring television stations to broadcast educational programming for children.

Thus, if challenged, the regulation would clearly be upheld under rational basis scrutiny. At most, intermediate review would apply. The FCC would be able to meet this standard by showing that the regulation furthers the substantial governmental interests of ensuring the integrity of its spectrum allocation process and in licensing broadcasting to serve the public interest goals of diversity and localism. Moreover, the requirement is narrowly tailored; it does not infringe on the licensee's editorial discretion any more than necessary and the alternative of awarding a preference for locally originated programming has proven insufficient to ensure that local program needs are being met.

## **Second-Adjacent Waivers Will Allow LPFM to Serve Urban Areas**

Prometheus representatives also argued in support of a second-adjacent frequency waiver standard modeled after the FM translator rules. Ms. Doyle explained that the Local Community Radio Act authorizes the Commission to grant waivers when LPFM stations will not cause interference to full-power stations,<sup>5</sup> which is the same standard the Commission uses when licensing FM translators. The Act also directs the Commission that LPFM and FM translators should be treated as equal in status. Ms. Doyle explained that current second-adjacent frequency restrictions keep LPFM stations out of urban areas because of lack of space on other frequencies, even though translators are regularly licensed in urban areas. Ms. Doyle also explained that there was no technical reason not to grant these waivers, as FM translators operating at higher power levels than LPFM stations already use second adjacent frequencies without incident. The Commission should adopt a waiver standard consistent with the intent of Congress in the Local Community Radio Act : if a station on a second-adjacent frequency will not interfere with an existing station, then the FCC should grant an LPFM license to a broadcaster for that frequency.

---

<sup>5</sup> Local Community Radio Act, Pub. L. No. 111-371, 124 Stat. 4072 (2011), § 3(b)(2)(A) (stating that the Commission “may grant a waiver of the second-adjacent channel distance separation requirement to low-power FM stations that establish, using methods of predicted interference taking into account all relevant factors, including terrain-sensitive propagation models, that their proposed operations will not result in interference to any authorized radio service.”).

## Timing

Finally, Prometheus representatives expressed our hope that the item would be voted on this fall and that the rules would provide sufficient time for community groups with limited resources to prepare their applications.

Respectfully submitted,

/s/ \_\_\_\_\_

Angela J. Campbell  
Laura M. Moy  
Institute for Public Representation  
Georgetown Law  
600 New Jersey Avenue, NW  
Suite 312  
Washington, DC 20001  
(202) 662-9535  
lmm258@law.georgetown.edu

*Counsel for Prometheus Radio  
Project*

October 9, 2012

cc: Bill Scher  
Royce Sherlock